(2)

No. 91-1082

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PHILIP E. FOSTER,

Petitioner,

vs.

RUTGERS, THE STATE UNIVERSITY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT RUTGERS, THE STATE UNIVERSITY

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February 1992

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the courts below correctly determine that petitioner failed to serve respondents with a copy of the summons and complaint within 120 days of filing as required by Fed. R. Civ. P. 4(j)?

2. Did the courts below correctly determine that petitioner did not establish "good cause" for his failure to comply with the 120-day time limit of Fed. R. Civ. P. 4(j)?

3. Did the courts below correctly determine there was no basis for the award of sanctions against respondents under Fed. R. Civ. P. 11?

LIST OF PARTIES TO THIS PROCEEDING*

Petitioner:

Philip E. Foster

Respondents:

Rutgers, The State University

The Rutgers Council of the American Association of University Professors

The American Association of University Professors

* The Permanent Panel on Procedures was a party defendant in the United States District Court for the District of New Jersey, but was not an appellee in the United States Court of Appeals for the Third Circuit, nor is it a respondent herein.

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases Cited: Page

Statutes Cited:

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Respondent Rutgers, The State University, respectfully requests that this Court deny the petition for a writ of certiorari. The merits of petitioner's claims in this action have been rendered moot as to Rutgers because a subsequent action he filed against respondents, containing virtually identical claims, has been dismissed with prejudice as to Rutgers. Further, the petition raises no "special and important reasons" for granting a writ of certiorari, but merely seeks review of correct applications of the plain language of the Federal Rules of Civil Procedure to the particular facts of this case.

STATEMENT OF THE CASE

A. Proceedings Below

This is the second in a trilogy of virtually identical actions brought by the petitioner, *pro se* attorney Philip E. Foster ("Foster"), against respondent Rutgers, The State University ("Rutgers").[1] Foster filed the complaint in this matter on August 24, 1988 against respondents and the Permanent Panel on Procedures (Pet. App. 99-137; Ja3).[2] Foster had been employed as an untenured faculty member in Rutgers' Graduate School of Management, pursuant to a three-year term contract (1984 to

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[1] The first action, *Foster v. Rutgers, et al.*, No. 86 Civ. 6765 (S.D.N.Y., filed Sept. 2, 1986) ("*Foster I*"), was dismissed, on February 2, 1987, on the bases of improper process, improper service of process, improper venue, lack of personal jurisdiction, and lack of subject matter jurisdiction under 28 U.S.C. §1332. *Foster v. Rutgers, et al.*, No. 86 Civ. 6765 (S.D.N.Y. Feb. 2, 1987). The United States Court of Appeals for the Second Circuit affirmed the judgment of the district court. *Foster v. Rutgers, et al.*, No. 87-7470 (2d Cir. Dec. 2, 1987).

Foster filed the third action, *Foster v. Rutgers, et al.*, Civil Action No. 90-2490 AJL (D.N.J., filed June 25, 1990) ("*Foster III*"), after the Third Circuit affirmed the district court's dismissal of the instant action. The *Foster III* complaint contains virtually identical allegations against the same parties as the instant action, except that the Permanent Panel on Procedures, which was a defendant in this proceeding before the district court, was omitted as a party. *Foster III* was dismissed with prejudice as to Rutgers, on August 20, 1991, on the basis of Foster's repeated refusals to comply with discovery orders. *Foster v. Rutgers, et al.*, Civ. No. 90-2490 AJL (D.N.J. Aug. 20, 1991). In addition, five of the six counts of the *Foster III* complaint have been dismissed with prejudice as to the Rutgers Council of American Association of University Professors ("Rutgers Council") and the American Association of University Professors ("AAUP"). Rutgers Council and the AAUP have moved to dismiss the remainder of *Foster III* with prejudice, due to Foster's failure to comply with court-ordered discovery deadlines. Those motions currently are pending before the district court.

[2] "Pet. App." refers to the Appendix to Foster's Petition.

"Ja" refers to the "Joint Appendix" filed with the United States Court of Appeals for the Third Circuit.

1987), which was not renewed (Pet. App. 103, ¶8; Pet. App. 113-114, ¶42). Foster's complaint alleges improprieties in the non-renewal of his term employment contract and in the handling of various grievances relating to his employment (Pet. App. 99-137).

On January 9, 1989, Rutgers filed a motion in lieu of answer, pursuant to Fed. R. Civ. P. 12(b)(2), (4), and (5), for dismissal of Foster's complaint on the basis that he, without good cause, failed to effect service of the Complaint upon Rutgers within 120 days after the filing of the Complaint as required by Fed. R. Civ. P. 4(j) (Ja21-22). Rutgers Council of the American Association of University Professors and the American Association of University Professors also moved for dismissal of Foster's complaint on the same basis (Ja3).

Foster filed cross-motions "for an Order declaring the service of Form 18-A[3] null and void, authorizing the holding of an evidentiary hearing, deferring decision on the motion of the AAUP, enlarging the time in which to make service, and imposing sanctions on the defendants herein and their counsel" (Ja73). By an Order entered on the docket May 3, 1989, the district court denied Foster's cross-motions and granted defendants' motions to dismiss Foster's Complaint without prejudice, pursuant to Fed. R. Civ. P. 4(j), for the reasons set forth in its Opinion dated May 3, 1989 (Pet. App. 66-81).

Foster then filed what he termed a motion "pursuant to Fed. R. Civ. P. 59 amending or altering the Court's Order of May 3, 1989. . ." (Ja156). The district court received Foster's motion on May 19, 1989 – two days after the ten-day period for filing such a motion had expired, pursuant to Fed. R. Civ. P. 59 and General Rule 12I of the United States District Court for the District of New Jersey (Pet. App. 88). The district court nevertheless considered Foster's motion pursuant to Fed. R. Civ. P. 60(b) (Pet. App. 88). By Memorandum Opinion and Order entered on the

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[3] Form 18-A is the "Notice and Acknowledgment for Service by Mail" form prescribed for federal service by mail under Fed. R. Civ. P. 4(c)(2)(C)(ii).

docket January 19, 1990, the district court denied Foster's motion* (Pet. App. 82-92).

Foster appealed to the United States Court of Appeals for the Third Circuit from the May 3, 1989 Order of the district court dismissing his Complaint as to Rutgers, Rutgers Council and the AAUP, and denying his cross-motions, and from that portion of the January 19, 1990 Memorandum Opinion and Order denying his motion for reconsideration (Ja1). By Judgment Order dated July 24, 1990, the Third Circuit affirmed the judgment of the district court (Pet. App. 62-64). Foster's petition for rehearing was denied on August 21, 1990 (Pet. App. 95-96).

B. Facts

Although appearing *pro se*, Foster is "an attorney duly admitted to the practice of law in the State of New York" (Pet. App. 188). He graduated from law school in 1977, and admits to having engaged in the practice of law from 1978 through 1984 (Pet. App. 139-140, ¶2).

Foster filed the complaint in this matter on August 24, 1988 (Ja3; Pet. App. 99-137).

By his letter dated September 10, 1988, Foster asked if Rutgers would accept service by mail of a summons and complaint in an action identified only as "Foster v. Rutgers, et al." (Ja25, ¶3; Ja27). By letter dated September 16, 1988, Rutgers' University Counsel advised Foster: "Since the applicable federal rules of civil procedure call for accepting service by mail, the University will accept service under those rules" (Ja24, ¶1; Ja25, ¶4; Ja28).

Foster asserted that, shortly after September 9, 1988, "[t]he clerk informed me that service could be made by certified mail,"

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* By the same Memorandum Opinion and Order, the district court dismissed the Complaint with prejudice as to the Permanent Panel on Procedures on the basis of absolute arbitral immunity (Pet. App. 84-87). Foster, however, did not appeal that portion of the district court's Order to the Third Circuit (Ja1) and the Permanent Panel on Procedures is not a respondent herein.

and that a district judge's clerk told him that service of a complaint had to be made within 120 days of its filing (Pet. App. 150, ¶13). He also asserted that, sometime after mid-September, 1988, he performed some legal research regarding permissible methods of service of process, contacted one attorney regarding adding parties and permissible methods of service, and called the district court clerk's office regarding adding parties and claims. (Pet. App. 151-154, ¶¶15, 16, 17).

Foster never explained to the courts below what he did with the rest of his time between mid-September, 1988 and December 19, 1988, although he did certify that he was not otherwise gainfully employed: "I had been unable to obtain full-time employment and had been in fact living on unemployment compensation benefits since June, 1988" (Pet. App. 153, ¶16).

Foster asserted that "[a]s the 120-day deadline approached, I prepared to serve the summons and complaint by certified mail. . . " (Pet. App. 154-156, ¶18). Foster further asserted that, on December 19, 1988, a clerk confirmed that he should use a Form 18-A for service by mail and that he needed to file proof of service (Pet. App. 154-156, ¶18). By his own account, on December 19, 1988 – 117 days after filing the complaint – Foster inserted the summons, complaint and a Form 18-A in an envelope addressed to Rutgers' University Counsel and brought it to the post office for mailing by certified mail, return receipt requested (Pet. App. 156-160, ¶¶19-20).

On December 23, 1988, on behalf of Rutgers, Rutgers' University Counsel signed the Form 18-A which had been enclosed with the summons and complaint mailed to Rutgers (Ja26, ¶7; Ja30). Foster admitted that he received the signed Form 18-A but did not bother to file it (Pet. App. 164, ¶26). Instead, Foster filed a conclusory "Affirmation of Service" with the court below, which stated:

> Philip Foster, an attorney duly admitted to the practice of law in the State of New York, affirms that a copy of the Summons and a copy of the Complaint

herein were duly served on each of the present Defendants herein on Dec. 19, 1988. So affirmed.

/s/ Philip E. Foster
Philip E. Foster, Esq.

(Ja29). Foster's affirmation notwithstanding, service was effected, whether under federal or state service by mail rules, upon defendant Rutgers no earlier than December 23, 1988 – the date on which Rutgers' University Counsel signed and returned Form 18-A – after the expiration of the 120-day period for service of the Summons and Complaint under Fed. R. Civ. P. 4(j).

REASONS FOR DENYING THE WRIT

A. This Action Is Moot as to Rutgers Because Foster's Subsequent Identical Action Against Rutgers Has Been Dismissed with Prejudice.

After the Third Circuit affirmed the dismissal of Foster's complaint in this action, Foster filed and served another complaint against respondents containing claims and factual allegations virtually identical to those in this action. That action, *Foster III*, has been dismissed with prejudice as to Rutgers, because Foster repeatedly refused to comply with the district court's discovery orders (*See* note 1, *supra*). Therefore, the instant action is moot as to Rutgers, because the dismissal with prejudice of *Foster III* would require dismissal of this action, were it remanded to the district court, under principles of *res judicata*. Therefore, Foster's petition should be denied on grounds of mootness.

B. No "Special and Important Reasons" Exist for Granting Foster's Petition.

Sup. Ct. R. 10 provides in part that "[a] petition for a writ of certiorari will be granted only when there are special and important reasons therefor." The Court has stated that '[c]ertiorari is granted only "in cases involving principles the settlement of which is of importance to the public as distinguished

from that of the parties . . . " ' *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502 (1951) (citations omitted). Foster's petition, however, raises no "special and important reasons," and the questions for which Foster seeks review are not of public importance, but pertain only to the facts of this case. Foster seeks review of a simple and correct application of Fed. R. Civ. P. 4(c)(2)(C)(i) and Fed. R. Civ. P. (c)(2)(C)(ii) by the courts below which resulted in the dismissal of Foster's complaint, without prejudice, because he failed to effect service within 120 days of filing, as required by Fed. R. Civ. P. 4(j). He also seeks review of the lower courts' correct determinations that he did not show good cause for failing to comply with the rule, and that sanctions were not warranted against respondents. As discussed herein, there is nothing "special and important" about these determinations warranting an exercise of this Court's discretion to review them, and therefore Foster's petition should be denied.

1. *No "Special and Important Reasons" Exist Warranting Review of the Lower Courts' Correct Determination that Foster Failed to Serve His Complaint Within the 120-Day Time Period Mandated by Fed. R. Civ. P. 4(j).*

Foster has always contended that he was trying to serve Rutgers by mail under the state service by mail rule, N.J. Ct. R. 4:4-4(a)(2), pursuant to Fed. R. Civ. P. 4(c)(2)(C)(i), rather than the federal service by mail rule, Fed. R. Civ. P. 4(c)(2)(C)(ii). Foster has always advanced his contention despite the fact that he mailed a Form 18-A to Rutgers in the same envelope in which he mailed the summons and complaint. Form 18-A states on its face: "The enclosed summons and complaint are served pursuant to Rule 4(c)(2)(C)(ii) of the Federal Rules of Civil Procedure" (Ja30).

Whether Foster's service by mail was attempted under the state rule or the federal rule, however, his service was not made within the 120-day time period mandated by Fed. R. Civ. P. 4(j), and, for that reason, along with the absence of good cause, his action was dismissed by the courts below for his failure to effect timely service.

Under both the federal and state service by mail rules, service is not effected unless and until the defendant affirmatively acknowledges service. Fed. R. Civ. P. 4(c)(2)(C)(ii); N.J. Ct. R. 4:4-4(a)(2) (service "shall be effective only if the party served answers or otherwise appears in response thereto").

Rutgers promptly acknowledged receipt of the summons and complaint on December 23, 1988 (Ja30). However, since Foster had dallied for so long before placing the papers in the mail, it was already past the 120th day.

Foster suggests that his petition should be granted because "[t]his Court has never ruled on whether F.R.C.P. 4(j) applies when service is attempted under F.R.C.P. 4(c)(2)(C)(i) by a person authorized to make such service by state law" (Petition at 28-29). The Court need not consider this supposed issue, however, because Fed. R. Civ. P. 4(j) makes only one exception to the 120-day limit: service in a foreign country pursuant to Fed. R. Civ. P. 4(i). No exception is made for service under a state law method. Therefore, Foster was bound to comply with Fed. R. Civ. P. 4(j) whether he was attempting service under the federal mailed service method or the state method.

Foster also asserts that his petition should be granted because the Court 'has never passed on the question of when service is "made" within the meaning of Fed. R. Civ. P. 4(j)' (Petition at 32). Foster argues:

> Since most civil litigation in the Federal courts is commenced by the service of a summons and complaint, and many suits are no doubt commenced by service of a summons and complaint pursuant to F.R.C.P. 4(c)(2)(C)(i), consideration of this Court of what law governs the determination of when such service is "made" within the meaning of F.R.C.P. 4(j), of when such service is "made", whether or not F.R.C.P. 4(j) applies when such service is made by someone authorized to make such service under state law, and who should bear the burden of proving untimeliness of service are important questions of Federal law which . . . should be settled by this Court.

(Petition at 34-35). Of course, contrary to Foster's contention, civil actions in federal court and the New Jersey state courts are commenced, not by service but, "by filing a complaint with the court." Fed. R. Civ. P. 3; N.J. Ct. 4:2-2. Further, there is no need for this Court to exercise its discretion to review the question of when service is made for purposes of Fed. R. Civ. P. 4(j) when service by mail is attempted under New Jersey court rules because New Jersey court rules make it clear that such service cannot be effective unless "the party served answers or otherwise appears in response thereto." N.J. Ct. R. 4:4-4(a)(2). Clearly, until the party "answers or otherwise appears," no effective service has taken place under New Jersey's optional mailed service provisions.

The only service issue decided by the courts below, and that needed to be decided, was whether Foster effected service within the 120 days required by Fed. R. Civ. P. 4(j). Nonetheless, Foster has tried to raise a variety of issues before this Court which simply are not present in this case.

For example, Foster argues that the decisions of the courts below are in conflict with "a decision by New Jersey's court of last resort" (Petition at 36-38). However, the decision cited by Foster, *County v. Pacific Coast Borax Co.*, 68 N.J.L. 273, 53 A. 386 (E. & A. 1902), bears absolutely no relevance to the instant matter. The *County* decision concerned the date of commencement of an action for statute of limitations purposes, not the effective date of service. *See County*, 68 N.J.L. at 274, 53 A. at 386 (affirming the lower court's ruling that an action was commenced "when process duly tested and issued was put in the hands of the sheriff for the purpose of being served"). The *County* decision does not address the issue of when service is made and therefore the decisions of the courts below are not in conflict with it. In any event, the *County* decision has been superseded by New Jersey's court rules. Civil actions in New Jersey are now commenced "by filing a complaint with the court," pursuant to N.J. Ct. R. 4:2-2, which became effective September 8, 1969.

There was no determination below as to when the action was commenced for the purposes of determining when a statute of

limitations was tolled. Indeed, if such an issue had been raised and addressed, the courts below would have determined that the service issue is irrelevant to the statute of limitations issue under both federal and state law. New Jersey law, like federal law, provides that an action is commenced, for the purpose of tolling the limitations period, when the complaint is filed. Fed. R. Civ. P. 3; N.J. Ct. R. 4:2-2; *West v. Conrail*, 481 U.S. 35, 39 (1987). Hence, there is no issue presented similar to that determined in *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980).

Furthermore, Rutgers is not amenable to service by mail under state law unless it affirmatively waives personal service requirements under state law. Pursuant to New Jersey law, Rutgers is a public body. *See, e.g.*, N.J.S.A. 18A:65-2 (Rutgers is "the instrumentality of the state for the purpose of operating the state university"). Service upon a public body pursuant to New Jersey's service rules may only be made by personal service. N.J. Ct. R. 4:4-4(g). Waiver of personal service can be accomplished only by a general court appearance or written acknowledgment. N.J. Ct. R. 4:4-6.

Although Foster states that he "has never claimed that he attempted service under F.R.C.P. 4(c)(2)(C)(ii)" (Petition at 39), he nevertheless devotes approximately 13 pages of his petition to argue that this Court should address the issue of when service is "made" under Fed. R. Civ. P. 4(c)(2)(C)(ii). The district court determined that, assuming Foster had attempted service under Fed. R. Civ. P. 4(c)(2)(C)(ii), he failed to effect service within 120 days of filing. The United States Court of Appeals for the Third Circuit affirmed this decision in this case in accord with its precedent. *Braxton v. United States*, 817 F.2d 238, 240 n.1 (3d Cir. 1987) ("service is complete either upon receipt by the sender of the defendant's official acknowledgment of service form within twenty days of the original first class mailing or upon effective personal service"); *Green v. Humphrey Elevator and Truck Co.*, 816 F.2d 877, 879-883 (3d Cir. 1987) (same). *See also Stranahan Gear Co. v. NL Industries, Inc.*, 800 F.2d 53, 56-7 (3d Cir. 1986) (service by mail pursuant to Rule 4(c)(2)(C)(ii) is not complete unless and until the official acknowledgment form is signed and returned).

The determinations of the courts below are also consistent with the decisions in ten of the eleven United States Courts of Appeals that have addressed the issue of when service is effected under Fed. R. Civ. P. 4(c)(2)(C)(ii). The First, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Eleventh and District of Columbia Circuits, like the Third Circuit, have all held that federal mail service is not effective unless and until the official acknowledgment form is signed and returned. *Media Duplication Services, Ltd. v. HDG Software, Inc.*, 928 F.2d 1228, 1233-34 (1st Cir. 1991); *S.J. Groves & Sons Co. v. J.A. Montgomery, Inc.*, 866 F.2d 101, 102 (4th Cir. 1989); *McDonald v. United States*, 898 F.2d 466, 468 (5th Cir. 1990); *Friedman v. Estate of Presser*, 929 F.2d 1151, 1155-56 (6th Cir. 1991); *Geiger v. Allen*, 850 F.2d 330, 332 n.3 (7th Cir. 1988); *Gulley v. Mayo Foundation*, 886 F.2d 161, 165 (8th Cir. 1989); *Worrell v. B.F. Goodrich Co.*, 845 F.2d 840, 841-42 (9th Cir. 1988), *cert. denied*, 491 U.S. 907 (1989); *Schnabel v. Wells*, 922 F.2d 726, 728 (11th Cir. 1991); *Combs v. Nick Garin Trucking*, 825 F.2d 437, 443-48 (D.C. Cir. 1987).

The Second Circuit has held that, under certain circumstances, mailed service pursuant to Fed. R. Civ. P. 4(c)(2)(C)(ii) may be effective where the defendant has received the summons, complaint and acknowledgment form but fails to sign and return the acknowledgment form. *Morse v. Elmira Country Club*, 752 F.2d 35 (2d Cir. 1984). In *Morse*, the plaintiff mailed copies of the summons, complaint and acknowledgment form to the defendant. *Id.* at 36. Although the defendant received those documents, it failed to sign and return the acknowledgment form. *Id.* The plaintiff then personally served the defendant, but not until after the statutory limitations period had expired. Plaintiff's claim in *Morse* was brought pursuant to New York law. *Id.* Unlike federal and New Jersey actions, state law actions in New York are commenced when the summons is served upon the defendant. *Id.* at 36-37 (citing N.Y. Civ. Prac. L. §203(b)(1) (McKinney 1973)). On these facts and applying New York's substantive law, the Second Circuit held that the mailed service was effective for purposes of tolling the limitations period, even though the defendant had refused to sign and return the acknowledgment form. *Id.* at 39.

The *Morse* opinion has been severely criticized,[5] and, as noted above, has not been followed by any other circuit. In any event, this case is an inappropriate vehicle for review of the correctness of the *Morse* decision, because *Morse* has no applicability to this matter. Unlike the defendant in *Morse*, Rutgers promptly signed and returned the Form 18-A to Foster within the twenty-day period prescribed by both the acknowledgment form and Fed. R. Civ. P. 4(c)(2)(C)(ii). Further, *Morse* did not address the question of when federal mail service was effective for purposes of Fed. R. Civ. P. 4(j) (a federal procedural question), but rather considered only whether effective service had taken place for purposes of tolling of the state law limitations period (a state substantive law question). The unique factual circumstances and legal issues that led to the Second Circuit's decision in *Morse* simply are not present here. Therefore, *Morse* is inapplicable to the instant matter.

In sum, it is unnecessary for this Court to use its discretion to hear this case to determine when service by mail is "made" for purposes of Fed. R. Civ. P. 4(j), because, under the plain language of Fed. R. Civ. P. 4 (c)(2)(C)(ii), it is clear that service is not "made" unless and until the acknowledgment form is signed and returned. Ten circuit courts have reached this identical conclusion.

The Court has recently defined its adjudicatory role in cases involving court rules: "Our task is to apply the text, not to improve upon it." *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 126 (1989). Rule revisions, if deemed necessary, are more appropriately made pursuant to this Court's rulemaking authority granted under the Rules Enabling Act, 28 U.S.C. §§ 2071, *et seq*. As such, there are no "special or important reasons" for granting certiorari in this matter, and therefore Foster's petition should be denied.

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[5] *See, e.g., Adatsi v. Mathur*, 934 F.2d 910, 911 (7th Cir. 1991); *Friedman*, 929 F.2d at 1155 n.5; *Media Duplication Services*, 928 F.2d at 1233-34; *Combs*, 825 F.2d at 445-48; *Green*, 816 F.2d at 881 n.8.

2. *No "Special and Important Reasons" Exist Warranting Review of the Lower Courts' Correct Determination That Foster Did Not Show "Good Cause" to Justify Late Service.*

Foster also requests that this Court review the determination of the courts below that he failed to show "good cause" for his untimely service under Fed. R. Civ. P. 4(j).[6] In particular, he asserts that the district court failed to apply the correct standards in making this determination (Petition at 51-55). Foster essentially argues that the district court failed to view his allegations in the light most favorable to him (Petition at 53-54). This is not so. The district court determined that, based upon Foster's own account of the steps he took to attempt service, Foster failed to show good cause justifying late service. Indeed, Foster's own account, fully credited, is a tale of intentional delay. Foster knew at least two things a month after he filed the complaint: one, he intended to serve by mail; and two, he had to complete service within 120 days of filing. Yet, he waited another three months before placing the summons and complaint in the mail.

The scope of appellate review of the district court's determination is whether the district court abused its discretion. *Braxton v. United States*, 817 F.2d 238, 242 (3d Cir. 1987). The Court has held that "[a] district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Cooter & Gell v. Hartmarx Corp.*, 110 S.Ct. 2447, 110 L. Ed.2d 359, 382 (1990). The Third Circuit already has determined that the district court did not abuse its discretion. What Foster seeks here is, not consideration of "important questions of Federal law" (Petition at 55) but rather, yet another review of the district court's assessment of the evidence. Such a review is not a sufficient reason for this Court to exercise its discretionary certiorari

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[6] Dismissal for failure to effect service within the 120-day period provided by Fed. R. Civ. P. 4(j), absent a showing of "good cause" by the plaintiff, is mandatory. *See Lovelace v. Acme Markets, Inc.*, 820 F.2d 81, 84 (3d Cir.) ("The 120-day limit to effect service of process, established by Fed. R. Civ. P. 4 (j) is to be strictly applied . . . ."), *cert. denied*, 484 U.S. 965 (1987).

jurisdiction. *See Cooter & Gell*, 110 L. Ed.2d at 381 (' "Fact-bound resolutions cannot be made uniform through appellate review, de novo or otherwise" [citations omitted]'). Therefore, Foster's petition should be denied with respect to the determination of the courts below that he failed to show good cause justifying late service.

3. *No "Special and Important Reasons" Exist Warranting Review of the Lower Courts' Correct Determination Denying Foster's Motion for Sanctions.*

Foster also seeks review of the lower courts' correct decision to deny his motion for sanctions pursuant to Fed. R. Civ. P. 11. Foster sought sanctions against Rutgers' counsel for filing the motion to dismiss for Foster's failure to effect timely service under Fed. R. Civ. P. 4(j).

Foster contends that Rutgers' counsel should not have relied upon Foster's mailing of a Form 18-A to Rutgers in support of Rutgers' claim that Foster was following the federal service by mail rule, Fed. R. Civ. P. 4(c)(2)(C)(ii). Foster contends Rutgers' counsel should have been confused as to Foster's attempted method of service due to Foster's failure to sign Form 18-A, Foster's inclusion of only one copy, instead of two copies, of Form 18-A, and Foster's use of certified mail, instead of ordinary mail. Foster contends that such confusion should have led Rutgers' counsel to make "reasonable inquiry" by calling Foster to find out what method of service he was trying to employ. Foster contends that if Rutgers' counsel had so inquired, Foster would have advised he was attempting service under the New Jersey service by mail rule.

The district court succinctly ruled:

> Plaintiff claims that because his enclosed Form 18-A was not signed, defendants are not within their rights in moving for dismissal. However, plaintiff cannot assert his own deficiency regarding his method of service, especially in light of the fact that plaintiff's service was untimely whether he was following the service

> procedures under federal or state rules. The court denies plaintiff's cross-motion for sanctions.

(Pet. App. 76).

The courts below quite rightly rejected Foster's preposterous contention, and denied his motion. The Court has held that a Rule 11 determination by a district court is subject to an abuse of discretion standard of review. *Cooter & Gell*, 110 L. Ed.2d at 381-82. "A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." 110 L. Ed.2d at 382. As is obvious by the facts presented by Foster in support of his motion, neither the district court's view of the law nor its assessment of the evidence was clearly erroneous. Clearly, this issue does not warrant further review by this Court.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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February 1992